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IN THE

Supreme Court of the United States

(1)

October Term, 1944. No. 967

UNITED STATES OF AMERICA, Ex Rel., THEODORE ROOSEVELT POTTS,

Petitioner,

v.

ROBERT W. RABB, United States Marshal for the Middle District of Pennsylvania,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

WALTER BIDDLE SAUL,
Counsel for Petitioner.

SAUL, EWING, REMICK & HARRISON,
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Eastern Bank Note Co., Phila., Pa.

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IN THE

Supreme Court of the United States.

October Term, 1944. No. .

UNITED STATES OF AMERICA, EX REL. THEODORE ROOSEVELT POTTS,
Petitioner,

v.

ROBERT W. RABB, UNITED STATES MARSHAL FOR THE MIDDLE DISTRICT OF PENNSYLVANIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit, entered in the above entitled case on January 17, 1945, and in accordance with the rules of your Honorable Court, sets forth and avers as follows:

A Summary Statement of the Matter Involved.

The petitioner Potts is claiming his constitutional right against arrest without reasonable cause, under the Fourth Amendment to the Constitution.

Potts was indicted by a United States Grand Jury, for the Middle District of Pennsylvania, sitting at Scranton, at the instance of the United States Attorney. The proceedings before the grand jury were secret and the petitioner was not given any hearing, either before the court or before a United States Commissioner.

Potts was notified by the United States Attorney to appear before a Judge for the District Court for the Middle District, sitting in Harrisburg. He did so appear and immediately demanded the protection of the Constitution against arrest without reasonable cause, and petitioned the court for a writ of habeas corpus. The District Court refused to grant the writ because the petitioner Potts was not then in the technical custody of the Marshal. A few moments after the refusal to grant the writ of habeas corpus the court issued a bench warrant for the petitioner's arrest. He was immediately arrested and taken into custody by the Marshal and while in the custody of the Marshal he filed a new petition for a writ of habeas corpus. The court denied the writ. Your petitioner, in order to avoid being taken to jail, entered bail and appealed the refusal of the District Court to grant the writ of habeas corpus to the Circuit Court of Appeals for the Third Circuit.

Your petitioner, in presenting this case to the judges of the Third Circuit, again demanded his constitutional rights under the Fourth Amendment. The Circuit Court of Appeals filed an opinion stating that the question of the petitioner's right to a writ of habeas corpus was moot because the defendant had been admitted to bail and on the question of his constitutional rights stated:

> "As we have stated the appellant has raised substantially the same objections to the sufficiency of the indictment in his motion to quash as he has in his petition for habeas corpus. His rights under the Fourth Amendment can be protected fully under the motion to quash. If there was no legally competent evidence before the grand jury which returned the indictment, that fact may be ascertained on the hearing of the motion. See in re Lancaster, 137 U. S. 393, 395; Brady v. U. S., 24 F. (2nd) 405, 407-408; Nanfito v. U. S., 20 F. (2nd) 377, 378; U. S. v. Rubin, 218 F. 245, 247-250.
>
> The appeal is dismissed as moot."

The petitioner Potts filed a petition for a writ of certiorari to your Honorable Court because he feared that the question of his rights under the Fourth Amendment could not be protected in the manner set forth in the said opinion of the Circuit Court as of October Term, 1943, No. 763.

Your Honorable Court refused to grant the writ on the 24th day of April, 1944.

Your petitioner thereupon attempted to avail himself of the remedy indicated by the Circuit Court of Appeals for the Third Circuit, and requested the District Court to permit him to secure from the records of the United States Attorney and the Marshal, the names of any witnesses who testified against him before the grand jury, for the purpose of enabling the petitioner Potts to show that such witnesses, if any, could not possibly have given any competent testimony against him.

The judge of the District Court for the Middle District refused to permit your petitioner to secure this information and thereupon dismissed the motion to quash the indictment for lack of any evidence to support the motion.

Your petitioner again appealed to the Circuit Court of Appeals for an order on the District Court in the form of an additional or supplemental mandate, in order that the petitioner might avail himself of the right which the Circuit Court of Appeals had stated the petitioner possessed.

The Circuit Court of Appeals, in an opinion filed January 17, 1945, denied your petitioner's motion and your petitioner is now left without any remedy of any kind save by application to your Honorable Court.

Opinions of the Court Below.

1. Opinion of Judge Watson, U. S. District Court for the Middle District of Pennsylvania, dated December 3, 1943, denying the application for a writ of habeas corpus.

2. Opinion of Judge Biggs, Circuit Court of Appeals for the Third Circuit, affirming the decision of Judge Wat-

son and setting forth the petitioner's rights respecting the Fourth Amendment.

3. Opinion of Judge Watson dated October 4, 1944, denying the petitioner's right to the names of witnesses who testified before the grand jury.

4. Opinion of Judge Watson dated October 4, 1944, dismissing the motion to quash the indictment.

5. Opinion of Judge Bard, Circuit Court of Appeals for the Third Circuit, dated January 17, 1945, dismissing the petitioner's petition for an additional mandate.

Jurisdiction.

The jurisdiction is founded on Article III, Sec. 2, of the Constitution, the question involved being the construction of the Fourth Amendment of the Constitution and a citizen's rights thereunder.

Section 240 of the Judicial Code; 28 U. S. Code Annotated, Sec. 347.

The Questions Presented.

1. Does a citizen of the United States, under the Fourth Amendment to the Constitution, have the right to demand that reasonable cause be shown for his arrest, before he can be taken into custody under a warrant, or before he can be compelled to stand trial?

2. Is an indictment found in secret by a grand jury, on the request of the United States Attorney, with or without evidence to support it, such reasonable cause as satisfies the Bill of Rights, or must the government show, when the right is claimed, that there is reasonable ground for the arrest?

Reasons Relied on for the Issuance of the Writ.

The petitioner Potts is claiming the substantial right which is afforded to him by the Fourth Amendment to the

Constitution—a right which protects him against arrest and necessarily against trial, unless probable cause be shown for the issuance of the warrant. The right that Potts claims is one of substance, not mere procedure. From the moment Potts was notified by the United States attorney that a bill of indictment had been found against him by a grand jury, he demanded his constitutional protection and at every stage of the proceeding he insisted that there be publicly shown, before some judicial tribunal, reasonable cause for the issuance of the warrant.

The petitioner Potts has been consistently refused this right and as a result of procedural decisions in the court below is now, unless the appeal to this court prevails, effectively deprived of his constitutional right and will be forced to stand trial without ever having an opportunity of proving (if the burden of proof be on him) that there was no reasonable cause for his arrest and trial.

The Bill of Rights contains matters of substance. The particular form of any procedure is unimportant so long as the substance of the right is preserved.

Whether a person accused of crime is indicted in the first instance by the grand jury, or arrested on a warrant and given a hearing before a committing magistrate or United States Commissioner, is entirely immaterial, so long as at some stage in the proceeding, before the defendant is forced to stand trial, he has the right to demand compliance with the constitutional guarantee that probable cause must be shown. That probable cause must be shown, under our form of government, publicly and before a judicial tribunal.

In so far as the constitutional guarantee is concerned, the right depends on the actual open presentation of the evidence, not the place or form where and how it is shown.

The petitioner Potts has no desire to violate the secrecy surrounding the grand jury and no desire to attempt to secure the government's evidence prior to trial. His only request is and his only claim of right is that there be

publicly shown, before a judicial tribunal, some evidence amounting to probable cause for his arrest and trial. It is immaterial to the petitioner Potts whether that evidence was presented before the grand jury or not. His claim is that no such evidence exists and cannot exist and that therefore he is protected against arrest and trial by the constitution, unless some evidence against him be publicly disclosed.

The procedural decisions of the District Court and the Circuit Court of Appeals have forced the petitioner Potts into the position of attempting to protect his right on a motion to quash the indictment. The Circuit Court of Appeals, on the appeal from the court below from the refusal of the District Court to grant a writ of habeas corpus, stated:

> "As we have stated the appellant has raised substantially the same objections to the sufficiency of the indictment in his motion to quash as he has in his petition for habeas corpus. His rights under the Fourth Amendment can be protected fully under the motion to quash. If there was no legally competent evidence before the grand jury which returned the indictment, that fact may be ascertained on the hearing of the motion. See in re Lancaster, 137 U. S. 393, 395; Brady v. U. S., 24 F. (2nd) 405, 407-408; Nanfito v. U. S., 20 F. (2nd) 377, 378; U. S. v. Rubin, 218 F. 345, 247-250.
>
> The appeal is dismissed as moot."

The petitioner Potts reiterates that he is claiming a substantial right without reference to procedure and that had an opportunity been afforded him to protect his right on a motion to quash, his constitutional guarantee would have been satisfied. Unfortunately, when your petitioner Potts attempted, in the District Court, to show that there was no probable cause for his arrest he was met with all of the technical rules of procedure surrounding the introduction of testimony applicable to an ordinary motion to

quash. He requested that he be given the names of the witnesses, if any, who supposedly testified against him before the grand jury, with the statement that if those names were given, he would then, by evidence, show that any such witnesses could not possibly have given any competent testimony against him. The names were refused and the motion to quash was denied, because of the failure of Potts to introduce any testimony that would justify the quashing of the indictment.

The Circuit Court of Appeals, on a motion made by the petitioner Potts to issue a supplemental mandate to the District Court to permit Potts to do the thing which the Circuit Court of Appeals said he had the right to do, to wit, protect his rights under the Fourth Amendment, on the motion to quash, refused relief.

The petitioner Potts is now in the position of being forced to trial unless relief is granted by your Honorable Court, without any reasonable cause having been shown at any stage of this proceeding, for his arrest and trial, and in spite of his demand for the protection of his rights under the Fourth Amendment at every stage of the proceeding. This denial is the result of the refusal of the court to recognize that the constitutional guarantees of the Bill of Rights are beyond and above mere matters of procedure.

Rights are valuable only when available. If a constitutional guarantee is beyond the plain, easy grasp of a citizen needing protection, the guarantee is worthless. The principles of the Bill of Rights stand alone and self-contained; alone and self-contained in that their outlines cannot be blurred by being tied to old time abuses or softened by some new supposed good. There is no compromise possible. They are, or they are not.

If it be the law that the United States attorney can secure the arrest and trial of a citizen by securing an indictment in secret from a grand jury and the citizen cannot demand that reasonable cause be publicly shown for such action, then surely some not unsubstantial portion of our liberty has been lost.

Position of the Court Below.

Neither the District Court nor the Circuit Court has been willing either to deny outright that the plaintiff has any rights under the Fourth Amendment in connection with the so-called United States Attorney's Bill, or on the other hand, neither court has been willing to grant the petitioner the right which he claims.

It is respectfully submitted that the petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals be granted.

And your petitioner will ever pray, etc.

WALTER BIDDLE SAUL,
Counsel for Petitioner.

SAUL, EWING, REMICK & HARRISON.

COMMONWEALTH OF PENNSYLVANIA :
COUNTY OF PHILADELPHIA :ss

WALTER BIDDLE SAUL, being duly sworn according to law, deposes and says that he is the attorney for Theodore Roosevelt Potts, the petitioner, and that the facts set forth in the foregoing petition are true.

Sworn to and subscribed :
before me this 16th day : Walter Biddle Saul
of February 1945 :

L. C. Sturtevant
(Seal) Notary Public
My Commission Expires
Feb. 26, 1947

APPENDIX.

In the District Court of the United States,
For the Middle District of Pennsylvania.

No. 160.

Habeas Corpus.

United States of America, ex rel. Theodore Roosevelt Potts,

v.

Robert W. Rabb, U. S. Marshal, Middle District of Pennsylvania.

OPINION.

October 20, 1943, Theodore Roosevelt Potts and others were indicted (No. 10984 October Term, 1943) and, in the indictment were charged with violation of the laws of the United States. November 15, 1943, Potts and the other defendants were detained in the custody of the marshal pursuant to processes of this court issued upon the indictment referred to. On the same day all of the Defendants were called for arraignment. They appeared in the court room before the Judge, and counsel for each defendant presented a petition for a writ of Habeas Corpus. On the same day after hearing in open court and, upon due consideration, the prayers of the petitions were denied. The petition of Potts, which is in the only case I shall discuss in this opinion, alleges that he is illegally in the custody of the United States Marshal for this district, because there are two indictments pending against him charging the same offense involving the same facts and evidence, and that he is, therefore, unlawfully restrained upon a charge for which he has

been previously indicted, and which said previous indictment has not "been discharged, quashed, or withdrawn". The Petitioner has not yet gone to trial under either indictment, and the present petition for Habeas Corpus is in advance of trial. On November 20, 1943 a Nolle Prosequi was entered as to the first or previous indictment (No. 10,787 December Term, 1942). Therefore, the question as to whether the Petitioner is entitled to a writ of Habeas Corpus for the reason set forth in the petition and above referred to is moot. However, in my opinion, the reason is entirely without merit. Kastel v. U. S. (CCA. 2) 30 Fed. (2d) 687, and cases there cited.

It is further alleged in the petition that no witnesses testified, nor could any witness testify before the Grand Jury which returned the second indictment who could legally give competent evidence of the charge set forth in the said indictment. This is clearly an attempt to test the legal sufficiency of the indictment by collateral proceedings. The Supreme Court has definitely pointed out that such proceedings are improper. Glasgow v. Moyer, 225 U. S. 420, 429. If it were permissible for defendants to test the validity of indictments by proceedings of this character the result would be intolerable confusion in the administration of justice, and such was not the intention of Congress when it vested the courts with power to issue writs of Habeas Corpus. Ex parte, Finn, 16 Fed. Supp. 1.

It appears from the petition itself that the Petitioner was not entitled to a writ of Habeas Corpus, and the prayer of the petition was, therefore, denied.

Scranton, Pa.

Dec. 3, 1943.

/s) Albert L. Watson,
United States District Judge.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 8543. October Term, 1943.

UNITED STATES OF AMERICA, ex rel. THEODORE ROOSEVELT POTTS,

Appellant,

v.

ROBERT W. RABB, U. S. Marshal, Middle District of Pennsylvania.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Before BIGGS, JONES and GOODRICH, *Circuit Judges.*

OPINION OF THE COURT.

(Filed February 14, 1944.)

By BIGGS, *Circuit Judge.*

The appeal at bar, stripped to its essentials, requires us to decide the question of whether an individual, arrested upon a bench warrant issued under an indictment, may test by writ of habeas corpus the sufficiency of the evidence before the grand jury which returned the indictment.

The indictment charges the appellant with a conspiracy to defraud the United States in connection with the

construction of a naval depot at Mechanicsburg, Pennsylvania. It was returned by a duly constituted grand jury of the District Court of the United States for the Middle District of Pennsylvania. After its return the appellant was advised by the United States Attorney to appear in court on November 15, 1943 for arraignment. When the appellant came into court his counsel filed a petition for a writ of habeas corpus. The court decided that the appellant was not entitled to the writ because he was not in custody. The United States Attorney then asked for and received a bench warrant for the arrest of the appellant. He was arrested in the courtroom by the United States Marshal. His counsel immediately filed a second petition for a writ of habeas corpus.

The appellant's second petition asserfed (as did his first) that no witness testified before the grand jury who could or did give legally competent evidence against him. He contends, therefore, that the bench warrant was issued without probable cause and in derogation of his rights under the Fourth Amendment to the Constitution of the United States.[1] The court again refused to issue the writ.[2] About two hours later the court admitted the appellant to bail which he immediately made. A few days later the appellant filed a motion to quash the indictment,[3] the grounds of the motion being those stated in his petitions for habeas corpus.

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[1] The history and development of the Fourth Amendment show that it guarantees the right of the individual to be secure in his person against unreasonable arrests, as well as against unreasonable searches of houses and seizure of papers and effects. See "The History and Development of the Fourth Amendment to the United States Constitution", Lasson, Series LV No. 2 of the Johns Hopkins University Studies in Historical and Political Science, 1937, and in particular pp. 35, 95, 117 and 132 and the authorities and notes cited therein.

[2] The court in its opinion dated December 3, 1043 gave the reasons for its refusal, stating, *inter alia*, "If it were permissible for defendants to test the validity of indictments by proceedings of this character the result would be intolerable confusion in the administration of justice, and such was not the intention of Congress when it vested the courts with power to issue writs of Habeas Corpus. Ex parte, Finn, 16 F. Supp. 1."
This decision has not been reported.

[3] This has been made part of the record before us.

The appellant in effect argues that because there was a short period of time following his arrest on the afternoon of November 15, 1943 in which he was in the custody of the United States Marshal he is entitled to prosecute this appeal despite the fact that he was admitted to bail a little later upon the afternoon of that very day. We cannot agree. The appeal at bar is moot. It was moot even when the notice of appeal was filed on November 29, 1943.

The writ of habeas corpus is one of the great writs upon which the liberty of the individual depends. Its grant cannot be permitted to turn upon an academic question of whether at a given instant in time an individual was within the custody of a United States marshal when in fact he was enlarged on bail a few hours later. Indeed, if we were to reverse the order of the court below and direct it to grant the writ, our mandate would be a nullity for the appellant is not presently deprived or restrained of his liberty. See the actual wording of R.S. § 754, 28 U.S.C.A. 454.[1] Cf. the facts of Ex parte Catanzaro, 138 F. (2nd) 100, 101 (CCA 3).

But quite aside from the foregoing, the learned District Judge committed no error in denying the petition for the writ. The courts of the United States have held almost without exception that the writ of habeas corpus will not lie to question the sufficiency of an indictment which on its face is within the jurisdiction of the court to which it was returned and that the writ of habeas corpus will not serve as a writ of error. Knewel, Sheriff, v. Egan, 268 U. S. 442; Frank v. Mangum, 237 U. S. 309; Valentina v. Mercer, 201 U. S. 131; Horner v. United States, 143 U. S. 570; ex parte Mason, 105 U. S. 696; ex parte Carll, 106 U. S. 521; In re Frederich, 149 U. S. 70, 75. The court below had jurisdiction of the appellant and of the offense with which he is

[1] R. S. Sec. 754 provides in part: "Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known."

charged. As we have stated the appellant has raised substantially the same objections to the sufficiency of the indictment in his motion to quash as he has in his petition for habeas corpus. His rights under the Fourth Amendment can be protected fully under the motion to quash. If there was no legally competent evidence before the grand jury which returned the indictment, that fact may be ascertained on the hearing of the motion. See In re Lancaster, 137 U. S. 393, 395; Brady v. United States, 24 F. (2nd) 405, 407-408; Nanfito v. United States, 20 F. (2nd) 377, 378; United States v. Rubin, 218 F. 245, 247-250.

The appeal is dismissed as moot.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 10984. October Term, 1943.

UNITED STATES OF AMERICA,
Plaintiff,

v.

THEODORE ROOSEVELT POTTS,
Defendant.

OPINION.

On the petition of Theodore Roosevelt Potts, to whom I shall refer as "the Petitioner", a rule was granted upon Frederick v. Follmer, United States Attorney for the Middle District of Pennsylvania to show cause why he should not give to Theodore Roosevelt Potts and his attorney, Walter Biddle Saul, the names of the witnesses who testified before the Grand Jury which returned the Indictment No. 10,984 October Term 1943.

The Petitioner first attacked the indictment by filing a petition for a writ of Habeas Corpus, alleging that he had been arrested upon a warrant issued without probable cause and praying for protection of the provisions of the Fourth Amendment of the Constitution of the United States. This Court refused to grant the writ and was sustained in its refusal on appeal, by the Circuit Court of Appeals, United States of America, Ex rel. Theodore Roosevelt Potts v. Robert W. Rabb, 141 F. (2d) 45.

In its opinion, the Circuit Court of Appeals stated: "As we have stated the appellant has raised substantially the same objections to the sufficiency of the indictment in his motion to quash as he has in his petition for Habeas Corpus. His rights under the Fourth Amendment can be protected fully under the motion to quash. If there was no legally competent evidence before the grand jury which

returned the indictment, that fact can be ascertained on the hearing of the motion."

Thereafter, a hearing was held on petition and rule on Robert W. Babb, United States Marshal for the Middle District of Pennsylvania, to show cause why the names of the witnesses who appeared and testified before the Grand Jury identified above should not be disclosed to the Petitioner. That rule was discharged and the petition dismissed.

Petitioner now attempts to obtain the names of the Grand Jury witnesses from the United States Attorney. He contends, first that the decision of the Circuit Court of Appeals above quoted must be adhered to closely as "the law of the case." This is undoubtedly true, but I differ with the Petitioner as to what that opinion holds and as to that which was intended by the Circuit Court of Appeals.

Petitioner contends that when the Circuit Court of Appeals informed him that he had the right to prove the fact that there was no competent evidence before the Grand Jury, it intended that he should be furnished with the names of those who testified before the Grand Jury in the absence of any allegation or showing that there was some irregularity on the part of the witnesses before the Grand Jury. Surely it cannot be seriously contended that the Circuit Court of Appeals, by pointing out the proper method of procedure for Petitioner, intended to overrule all prior settled law on the question here involved. The Circuit Court of Appeals merely meant that Petitioner had the right to show irregularity by some legally competent evidence of his own and not by some breach of precedent.

The general rule is that ~~the Defendant~~ is not entitled as a matter of law to a list of the names of the witnesses who appeared before the Grand Jury. There is no provision in the law requiring the United States Attorney to furnish the Defendant with the names of those who testified before the Grand Jury. But, on the contrary, there is a regulation promulgated by the Attorney General May 22,

1939, pursuant to authority vested in him by statute, 5 U. S. C. A. 22, making all official records in the office of the United States Attorney confidential, and requiring the United States Attorney to refuse to produce such records on request. This regulation has the force of law, and the Court has no jurisdiction or power to punish an officer for conforming to that law." Ex Parte Sackett, 74 Fed. (2d) 922. In United States v. Carson, 291 F. 646, a request similar to the one made here was refused. Judge Learned Hand made this statement: "No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime."

Petitioner contends that in certain cases a situation might arise, in which circumstances and evidence would compel the Court in fairness to the accused to enter into an investigation of the Grand Jury proceedings to determine its actions, the testimony taken before it, and the witnesses giving that testimony. It is true that a situation might arise pressing the Court to such an investigation of the Grand Jury's activities, but that should take place only on a showing by the Petitioner of sufficient reason on which the Court might base its belief that irregularities had occurred. In the case at bar, Petitioner has continuously made apparent his total lack of knowledge of any circumstances which would cast any doubt upon the propriety of the proceedings before the Grand Jury. It would be presumptuous of this Court to demand that the names of the witnesses be made known to the Defendant in conflict with all prior precedent on no less provocation than that the Petitioner states that he is innocent and, therefore, he should have the names of the witnesses who testified before

the Grand Jury, in order that he may have an opportunity to show "whether or not there was any legally competent evidence before the Grand Jury."

Now, October 4, 1944, the rule to show cause is discharged, and the petition is dismissed.

ALBERT L. WATSON,
United States District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 10984. October Term, 1943.

United States of America,

Plaintiff,

v.

Theodore Roosevelt Potts,

Defendant.

OPINION.

This matter is before the Court upon motion of the Defendant to quash the indictment and the motion of Government to strike off Defendant's motion and answer.

The motion to quash as filed sets forth various grounds but at hearing thereon, counsel for the Defendant withdrew all grounds except the ground that there was no competent evidence before the Grand Jury that would justify the returning of an indictment against the Defendant.

At the hearing on the motion to quash, the Defendant sought, by calling the United States Attorney to the stand, to ascertain the names of the witnesses examined by the Grand Jury and offered to prove by subsequent testimony that the witnesses examined could not have produced any competent evidence to justify Defendant's indictment. Counsel for the Government objected to the examination of the United States Attorney as to the names of the witnesses appearing before the Grand Jury and this objection was sustained. Thereupon, counsel for the Defendant introduced letters exchanged between himself and the United States Attorney in which the latter refused, upon request, to furnish Defendant with the names of the witnesses who appeared before the Grand Jury and then rested.

This being the state of the record, it is obvious that Defendant has produced no evidence to support his motion to quash and the same must be dismissed.

Although there is undoubtedly considerable merit in the reasons relied upon by the Government in its motion to strike, in view of the conclusion reached with reference to the motion to quash, it is unnecessary to pass upon the questions raised by the Government's motion to strike.

Now, October 4, 1944, the motion of the Defendant to quash the indictment is denied.

(s) ALBERT L. WATSON,
United States District Judge.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 8543. October Term, 1943.

UNITED STATES EX REL. THEODORE ROOSEVELT POTTS,

Appellant,

v.

ROBERT W. RABB, UNITED STATES MARSHAL FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

PETITION FOR MANDATE TO THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

Before GOODRICH and MCLAUGHLIN, *Circuit Judges,* and BARD, *District Judge.*

OPINION OF THE COURT.

(Filed January 17, 1945.)

BARD, *District Judge.*

This matter is before us upon a petition to issue a "supplemental" or a new mandate to the District Court of the United States for the Middle District of Pennsylvania directing it to "follow the decision" of this court rendered in an appeal from a previous decision of that court and reported in 141 F. 2d 45. The petition requests

that such new mandate direct the district court to compel the United States attorney to disclose to petitioner the names of the witnesses who testified before a grand jury which returned an indictment against petitioner charging him and others with a conspiracy to defraud the United States.

The facts, so far as they are relevant, are that petitioner was arrested on a bench warrant issued by the district court under the indictment against him. He thereupon filed a petition for a writ of habeas corpus, contending that the bench warrant was issued against him without cause and in derogation of his rights under the Fourth Amendment to the Constitution of the United States. On the same day he was freed on bail. A few days later he filed a motion to quash the indictment on the same ground asserted in his petition for writ of habeas corpus.

From the denial of his petition for a writ of habeas corpus petitioner appealed to this court, which dismissed his appeal as moot in view of the fact that the petitioner was not being restrained of his liberty. In our opinion, referred to above, we called attention to the fact that in any event a writ of habeas corpus would not lie to question the sufficiency of an indictment which on its face is within the jurisdiction of the court to which it was returned, and added at page 47: "As we have stated the appellant has raised substantially the same objections to the sufficiency of the indictment in his motion to quash as he has in his petition for habeas corpus. His rights under the Fourth Amendment can be protected fully under the motion to quash. If there was no legally competent evidence before the grand jury which returned the indictment, that fact may be ascertained on the hearing of the motion."

Petitioner subsequently filed with the district court a rule on the United States attorney to show cause why he should not disclose to petitioner or his attorney the names of the witnesses who testified before the grand jury. The court, in a written opinion, dismissed this petition.

At the hearing of the motion to quash the indictment, the court upheld the right of the United States attorney to refuse to disclose the names of the witnesses who testified before the grand jury and dismissed petitioner's motion to quash the indictment.

Petitioner seeks in effect to challenge these rulings as violative of the Fourth Amendment and as in conflict with the language quoted above from our previous opinion in this appeal. Even if petitioner's contention were sound,[1] it would afford no basis for modifying the mandate in accordance with the prayer of the petition. The mandate was issued, upon the dismissal, as moot, of an appeal for the denial of a writ of habeas corpus. In arriving at that decision, the question whether the petitioner was entitled to the names of the witnesses who testified before the grand jury was not involved, and nothing in our opinion was intended to express our views thereon. Accordingly, it is clear that the mandate was properly confined to the decision rendered in the appeal and may not be modified as requested by the petitioner.

Petitioner further contends that he is entitled to the relief sought, under Section 262 of the Judicial Code, 28 U. S. C. A. § 377, which authorizes circuit courts of appeals to "issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." The Supreme Court has recently held, however, that the issuance of writs under this section is restricted to cases in which they are issued in aid of the exclusively appellate jurisdiction of the circuit courts of appeals and not as a means of reviewing prematurely rulings made by the district courts within their jurisdiction and reviewable only upon appeal from final judgment, even though this requires the defendant to undergo the

[1] The petitioner has presented no decision contrary to the principles and authorities set forth by Judge Watson, of the District Court, in his opinion. United States v. Potts, 57 F. Supp. 204.

cost and inconvenience of a trial under the challenged indictment. Roche v. Evaporated Milk Association, 319 U. S. 21, 87 L. ed. 1185.

The petition is dismissed.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

No. 967

In the Supreme Court of the United States

OCTOBER TERM, 1944

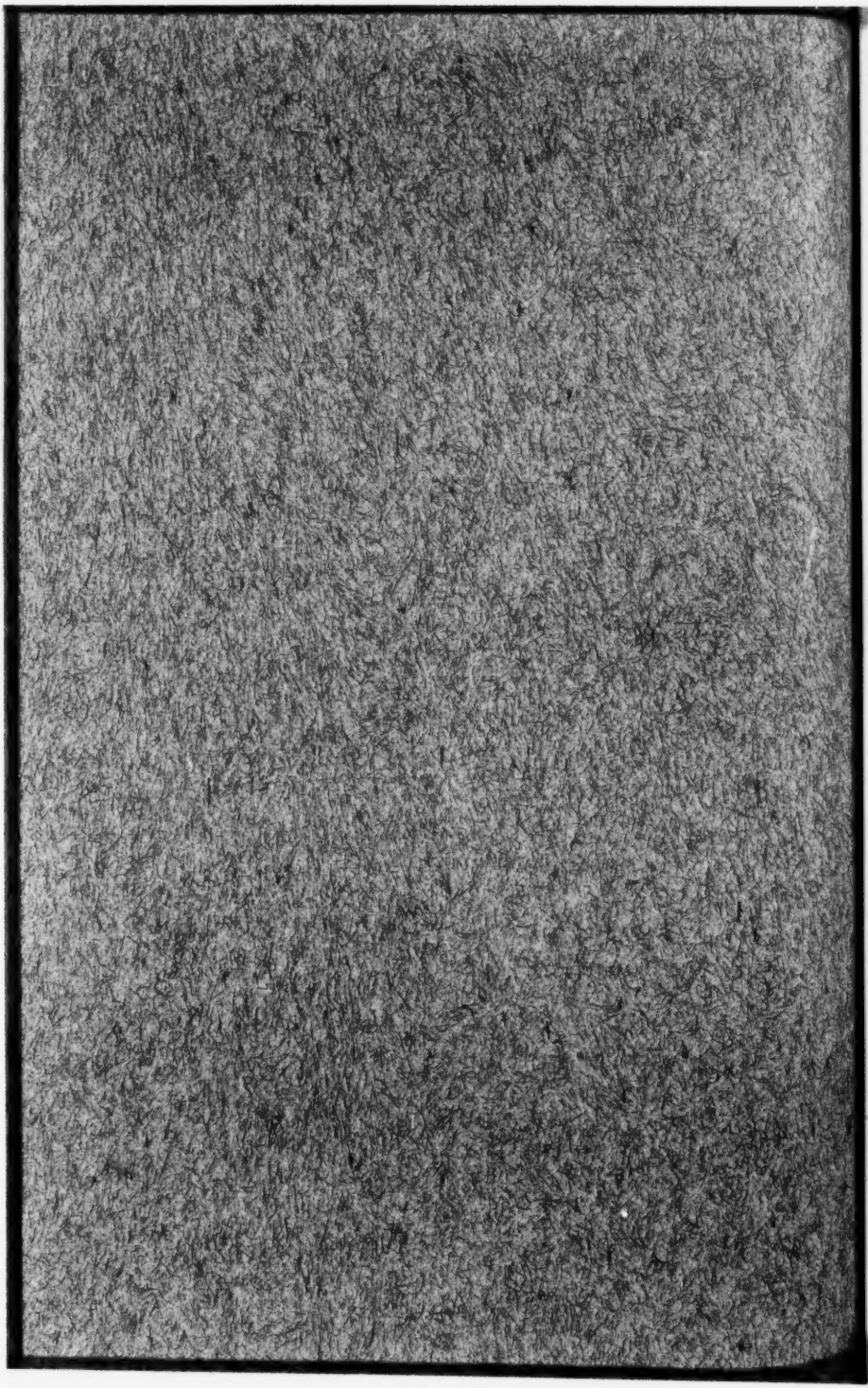
UNITED STATES OF AMERICA, EX REL. THEODORE ROOSEVELT POTTS, PETITIONER,

v.

ROBERT W. KEAN, UNITED STATES MARSHAL FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF HABEAS CORPUS AND CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION



In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 967

UNITED STATES OF AMERICA, EX REL. THEODORE ROOSEVELT POTTS, PETITIONER

v.

ROBERT W. RABB, UNITED STATES MARSHAL FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This proceeding is a continuation of the litigation which was before this Court on petition for a writ of certiorari in *United States, ex rel. Potts* v. *Rabb*, No. 763, October Term, 1943, certiorari denied, 322 U. S. 727. The proceedings in the case may be briefly summarized as follows:

On October 20, 1943, petitioner and others were indicted in the United States District Court for the Middle District of Pennsylvania for conspiracy to defraud the United States. Petitioner was arrested on a bench warrant issued by the

district court and he immediately filed a petition for a writ of habeas corpus, alleging that he was being unlawfully restrained in the custody of the respondent, the United States Marshal for the Middle District of Pennsylvania, because a prior indictment returned against him had not been discharged or withdrawn,[1] and for the further reason that no witnesses testified before the October 1943 term grand jury who could or did give legally competent evidence of the charge set forth in the indictment returned by that body. The court denied the petition on the ground that it constituted a collateral attack upon the legal sufficiency of the indictment and that the matters asserted therein should be raised by a motion to quash. Petitioner then pleaded not guilty to the indictment and a few hours later he was released on bond. He then filed a motion to quash the indictment on the ground that no competent evidence was produced before the grand jury and also took an appeal to the circuit court of appeals from the order of the district court denying his application for a writ of habeas corpus. The circuit court of appeals dismissed the appeal as moot, since petitioner had been released from respondent's custody on bond. It also stated that petitioner's rights could be fully protected under his motion to quash; that his

[1] The Government subsequently entered a nolle prosequi to this indictment.

remedy was not by habeas corpus. Thereafter petitioner filed a petition for a writ of certiorari in this Court seeking review of the decision of the circuit court of appeals. The petition for a writ of certiorari was denied. 322 U. S. 727. (See Memorandum for the Respondent in Opposition in that proceeding; Appendix to petition for writ of certiorari in this case, pp. 9–14.)

Shortly thereafter petitioner sought an order from the district court directed to the United States Attorney to show cause "why the names of the witnesses, if any, who testified before the grand jury which found the indictment against your petitioner, should not be disclosed to the petitioner's attorney, for the purpose of permitting the petitioner to show by evidence on the hearing of the motion to quash, that no competent evidence could be given by such witnesses against your petitioner, before the grant jury" (R. 2–3). The order to show cause was issued and a hearing was had (R. 5). Thereafter the court discharged the order to show cause on several grounds (R. 5–7); the motion to quash the indictment was also denied (R. 3).

Petitioner then filed a petition in the circuit court of appeals for a supplemental mandate on the habeas corpus appeal, which would direct the district court "to follow" the prior decision of the circuit court of appeals by compelling the United States Attorney to disclose to petitioner

the names of the witnesses who testified before the grand jury (R. 1–4). The circuit court of appeals dismissed the petition on the ground that the mandate in the habeas corpus proceeding "was issued, upon the dismissal, as moot, of an appeal for [sic] the denial of a writ of habeas corpus. In arriving at that decision, the question whether the petitioner was entitled to the names of the witnesses who testified before the grand jury was not involved, and nothing in our opinion was intended to express our views thereon" (R. 15). The court rejected petitioner's contention that it had power to grant the relief sought under Section 262 of the Judicial Code (28 U. S. C. 377), on the ground that the authority granted by that section does not contemplate the issuance of writs prematurely to review rulings by a district court which may be reviewed on appeal from the final judgment (R. 13–15).

The instant petition for a writ of certiorari seeks review of this last decision of the circuit court of appeals. Petitioner's contention (Pet. 4–8), in essence, is that he is being deprived of a constitutional right because of "mere matters of procedure." This contention is without merit. It is plain that what petitioner is attempting to do is, improperly, to use a habeas corpus proceeding, which, moreover, is moot, to secure an appellate review of a ruling of the district court incident to the denial of a motion to quash the

indictment in advance of the orderly procedure of appeal permitted him in the event he should be convicted. Even if, instead of resorting to habeas corpus, he had attempted in the criminal proceeding, prior to conviction, to appeal the district court's ruling, it is obvious that such premature appellate consideration would not have been permitted. Consequently, the circuit court of appeals was clearly right in denying the relief sought by petitioner.[2]

The petition for certiorari presents no point warranting review by this Court. We therefore respectfully submit that it should be denied.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

IRVING S. SHAPIRO,
MAYTE B. GREENE,
Attorneys.

MARCH 1945.

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[2] The circuit court of appeals has sufficiently pointed out in its opinion (R. 15), that the "all writs statute" (Section 262, Judicial Code; 28 U. S. C. 377) upon which petitioner relied in that court, does not authorize the relief requested of it.

U. S. GOVERNMENT PRINTING OFFICE: 1945